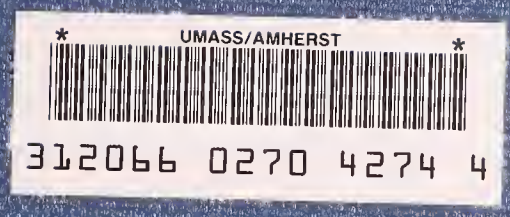

The Commonwealth of Massachusetts
Health Facilities Appeals Board

Boston University School of Law
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RE: North Shore Health Planning Council, Inc. v. Department of Public Health

RULING ON APPELLEE'S MOTION TO DISMISS APPEAL FOR LACK OF TIMELY FILING

Appellant North Shore Health Planning Council appealed to this Board from the Department of Public Health's grant of a certificate of need for a 120 bed nursing home to Heritage of Malden (hereinafter the applicant). Appellant's appeal was filed on March 11, 1986, more than 14 days from the February 24 receipt of notice of the determination of need. M.G.L. c.111, Section 25E requires appeals to this Board to be filed within 14 days of the determination of need.

We have reviewed the record in this case, and conclude that in essence the applicant has been caught in a policy dispute between the appellant HSA and the appellee, Department of Public Health over the best way to ensure access to nursing home beds for Medicaid recipients. Without going into the facts in detail, it appears that the HSA and the applicant agreed on a method designed to provide nursing home access for Medicaid patients that is more stringent than the method currently required by the Department. In issuing its determination of need, the Department did not require use of the HSA scheme, but encouraged the parties to live up to their agreement voluntarily. We have also been assured that the applicant intends to live up to its agreement, which it characterizes as a promise

to admit patients on a "first come, first served" basis.

Although we reserve the right to waive the requirement that appeals be filed in timely fashion in appropriate circumstances, this case does not appear to warrant such treatment. If the applicant is willing to abide by its agreement with the HSA, it seems inequitable to hold the applicant's DON hostage in order for the Department and the HSA to resolve their policy dispute.

The Board has been made aware that a number of HSAs have instituted a policy of attaching "access conditions" to all new DONs within their jurisdiction. We assume that the Department's position will be similar to their stance on the case in question. Therefore, we would strongly urge the policy makers at the state and regional level to commence discussions to resolve this impasse.

For the foregoing reasons, the Department's motion to dismiss on the ground of lack of timely filing is GRANTED.

Health Facilities Appeals Board

July 3, 1986

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Lahey Clinic Hospital, Inc. v. Department of Public Health

DoN Project No. 4-3224

Final Decision

This appeal to the Health Facilities Appeals Board ("Board") by the Lahey Clinic Hospital, Inc. ("Lahey") results from the Department of Public Health's ("Department") 6 May 1986 denial of Lahey's application for a determination of need. Lahey seeks to add 87 medical surgical beds and 4 operating rooms, and to establish a cardiac surgery program at its Burlington facility. Lahey requests the Board to remand the case for further proceedings based on the Department's alleged abuse of discretion with respect to Factors 2, 3, 6, and 7 applicable to determinations of need. 105 CMR 100.533 (B). No violations of applicable law or procedure are claimed. As all parties to this appeal are aware, no abuse of discretion will be found if substantial evidence can be found in the record to support the Department's decision. For the reasons cited below, the Board denies Lahey's appeal.

This DoN application, No. 4-3224, is Lahey's second attempt to expand its facility. The 1982 application was denied by the Department on 2 May 1983 based upon Lahey's noncompliance with six of the eight factors governing approvals for DoNs, and on 20 September 1983, this Board denied Lahey's appeal from that decision. In September of 1983, Lahey submitted another application seeking approval for 150 medical/surgical beds (revised to 87 medical/surgical beds on 1 December 1984), 4 operating

rooms, and the transfer of a cardiac surgical service from New England Deaconess Hospital to its Burlington facility. On 6 May 1986 the Department denied that application based upon Lahey's noncompliance with four of the eight factors governing approval of DoNs. This appeal results from that denial.

DoN applicants must prove by clear and convincing evidence that their applications satisfy all eight factors set forth in 105 CMR 100.533 (B) governing approval of DoNs. The factors cited as reasons in the Department's 1986 denial involve:

Factor 2 - Health Care Requirements

Factor 3 - Operational Objectives

Factor 6 - Reasonableness of Expenditures and Costs

Factor 7 - Relative Merit

The underlying issue in this appeal is whether, and under what conditions, a health facility should be permitted to add new acute care beds to a health care system which is already seriously overbedded. The Department has substantiated a surplus of 59 such beds within Lahey's subarea and of 634 beds within a 15 mile radius of Lahey. In essence, the Department found that the demand which Lahey physicians have generated within the Lahey facility for additional acute care beds does not provide a sufficient basis for finding need for such beds in the area as a whole. Despite the dispute over the exact number of beds to be identified as surplus and over the potential impact of HMO membership on the need for beds, the Board holds that the Department's determination that there was no need for the project is supported by substantial evidence.

The core disagreement between Lahey and the Department involves a policy matter which this Board has no authority to second guess. The Department has decided that the demand for medical care as delivered by Lahey in its service area is not the most relevant consideration for determining need. Thus with respect to factors 2 and 3, the Department found that adding capacity to Lahey would duplicate services available elsewhere and would have an adverse impact on other institutions in the

area by decreasing their patient base. Whether this makes sense as a policy decision is not for the Board to say, so long as the Board finds, as we do, substantial evidence to support such a conclusion in the record. Staff Summary at 13-14.

With respect to factor 6 involving the Reasonableness of Expenditures and Costs, the record contains ample evidence upon which the Department could find that total costs to the system of implementing Lahey's application would be excessive. Staff Summary at 23. Rate Setting Commission Study at 2-8. Regardless of disagreement over the Rate Setting Commission's methodology for calculating costs, adding acute care beds to an overbedded region adds expenses to the health care system as a whole, at least for the short run. The fact that reimbursement methodologies can and do change over time does not invalidate the basic thrust of the Rate Setting Commission's cost projections on a proposal with the magnitude of this one. With respect to Lahey's application to add a cardiac surgery unit to its Burlington facility, the current availability of cardiac surgery in nine other programs in the region supports the Department's finding that there would be further duplication of cost if a determination of need were granted. Staff Summary at 20 and 24.

With respect to factor 7, Relative Merit, the record amply supports the Department's finding that Lahey engaged in no meaningful efforts to explore the availability of alternative arrangements to avoid duplication of services, despite the apparent willingness of nearby hospitals to cooperate. Staff Summary at VII-15. HSA IV Staff Analysis, Appendix 8. Lahey obviously and understandably seeks to consolidate and expand all of its operations at its Burlington campus, but Lahey's desires are not necessarily synonomous with maximizing total patient welfare in the Commonwealth. The Department did not abuse its discretion by finding that Lahey's application failed to satisfy factor 7.

In summary, there is substantial evidence in the record to support the Department's finding that Lahey failed to prove by clear and convincing evidence that it satisfied factors 2, 3, 6, and 7 required for a determination of need. Lahey's appeal from the Department's denial of its determination of need is therefore DENIED.

All parties are by this denial notified of the right to judicial review of this decision under G.L. c.30A S14.

*Steven Tringale was present at the hearing but took no part in deciding this appeal.

The Commonwealth of Massachusetts

Health Facilities Appeals Board

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Peter Benjamin Ten Taxpayer Group v.
The Department of Public Health and Baystate Medical Center

DoN Project No. 1-3325

FINAL DECISION

This appeal to the Health Facilities Appeals Board by the Peter Benjamin Ten Taxpayer Group ("Benjamin TTG") results from the Department of Public Health's ("Department") February 25, 1986 approval of Baystate Medical Center's ("Baystate") application for a Determination of Need for a Magnetic Resonance Imaging ("MRI") unit. Benjamin TTG requests the board to remand the case for further proceedings based on the claim that the Department's action was the result of improper procedure and was an abuse of discretion.

The board denies Benjamin TTG's request to remand the case to the Department.

BACKGROUND

On September 16, 1985, The Commonwealth of Massachusetts entered into an agreement with the Massachusetts Medical Society ("MMS") which contained the goal of 85% voluntary Medicaid participation by all Massachusetts physicians by the year's end in 1986.

The Benjamin TTG proposed that the Department attach a condition to the Baystate DoN application forbidding Baystate from accepting referrals to its MRI unit from any physician who is not a Medicaid provider. The Benjamin TTG argued that this condition was necessary because of the low rate of Medicaid participation by physicians expected to be the major referral sources to the MRI unit. The Benjamin TTG concluded that only by attaching this condition could the Medicaid

access problem within Baystate's sub-area be remedied.

DECISION

The Benjamin TTG and the Department both agree that a problem of access to neurology and neurosurgery services exists for patients in HSA I. The Benjamin TTG alleges that the Department abused its discretion by failing to condition referral access to Baystate's MRI unit on Medicaid provider status. There is, however, substantial evidence in the record to support the Department's decision not to require Medicaid provider status for all referring physicians. In particular, the MMS agreement (Staff Summary at 14) anticipates statewide improvement in Medicaid participation rates, and the Department did not abuse its discretion by preferring that approach to solving the acknowledged problem, at least for the short run.

The appellant further claims that John O'Donnell, Director of the DoN program, allegedly misrepresented the Department of Public Welfare's ("DPW") position on Benjamin TTG's proposed access conditions in his remarks before the Public Health Council. We note, however, that the Director of the Medicaid program has signed an affidavit to the effect that, after receiving the transcript of the February 25 PHC meeting, Mr. O'Donnell's comments accurately represented the Medicaid program's position concerning the proposed condition. (Affidavit submitted to the Board with Appellant's Brief). There thus can be no issue with respect to misrepresentation on this appeal.

The appellant claims, however, that the Department violated the intent of 100 C.M.R. 100.51> (E) by introducing evidence concerning DPW's position on the access condition at the PHC meeting without giving prior notice. Appellant claims surprise and lack of opportunity to prepare rebuttal evidence. Appellant could have asked for a postponement in order to prepare a response, but chose not to avail itself of that option. Regardless of whether appellant waived its rights by failing to request such a postponement, or whether Mr. O'Donnell's statements violated the intent of the regulations that parties not be surprised at the PHC meeting, this Board is of the opinion after reviewing the record that admitting Mr. O'Donnell's statements would amount at most to harmless error.

The appellant's claim of appeal is therefore DENIED.

Health Facilities Appeals Board

September 16, 198[illegible]

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St. John of God Hospital v. Department of Public Health

Project No. 4-3313

Final Decision

This appeal to the Health Facilities Appeal Board ("Board") by St. John of God's Hospital ("St. John's"), is based on the Department of Public Health's ("Department") February 11, 1986 denial of project number 4-3224. The application proposed the addition of 5 beds to establish an inpatient unit for hospice patients. The maximum capital expenditure associated with this project was $291,000 as of September 1984. The beds were proposed as the inpatient component of The Good Samaritan Hospice ("TGSH"), a community and home based program sponsored by the Archdiocese of Boston.

St. John's contends that the Department committed two reversible errors in reviewing the application in question. First, because of the long time delay in reviewing the application, the Department inappropriately utilized the 1985 Hospice Guidelines in its analysis. St. John's, which filed the application on September 4, 1984, claims that it should not be held at risk of prejudiced in any way by guidelines which were not approved by the Public Health Council until August of 1985. In addition, the Appellant contends that the Department's interpretation of the 1985 guidelines was arbitrary.

St. John's contends that use of the 1985 guidelines constitutes a violation of 105 CMR 100.4 (A), which requires that reviews be based on the written record compiled by the Department, including rules and regulations in effect at the filing date of the application. St. John's also argues that even

if it were deemed appropriate for the Department to utilize the 1985 Hospice Guidelines, the Department misinterpreted those guidelines. Specifically, the applicant questions the Department's position that the 1985 guidelines require that hospice beds be medical-surgical beds for licensure purposes. Acceptance of the Department's interpretation of the 1985 guidelines would preclude St. John's from developing any inpatient hospice capacity because the hospital is not licensed as an acute care facility under Massachusetts licensure requirements.

While the applicant presents a number of areas where it believes it was prejudiced and aggrieved by the Department's actions, this Board remands the application for reconsideration because the 1985 hospice guidelines affected the Department's evaluation and this constituted a violation of the Department's own procedural rules. However, in the Board's opinion, and as conceded by counsel for the Department at oral argument on August 16, 1986, the existence of the 1985 guidelines clearly affected the Department's review of the application. See Staff Report, pp. 3 and 4 and Staff Response to Applicant's comments, p. 3. Use of the 1985 guidelines may or may not result in a different recommendation by the Department on St. John's application on remand, but the 1985 hospice guidelines are the appropriate standard of review for this application according to 105 CMR 100.540(B). The Board urges the Department to review the application on remand with special emphasis on factors two, three, and seven, where the Department contended the application was deficient.

The applicant also contends the Department inappropriately interpreted the 1985 guidelines. The Board makes no ruling on this contention because use of the 1985 guidelines itself constituted a breach of the Department's procedural rules. However, the Board notes that the applicant's arguments raise important questions as to the meaning and intent of the Department and the PHC when the 1985 hospice guidelines were approved. Specifically, whether all hospice beds located in a hospital must be inpatient medical-surgical beds seems unclear. The Board suggests that the Department clarify this issue at the earliest possible date. If the Department's interpretation of the 1985 guidelines is affirmed by the PHC, it would seem appropriate to conduct an informational mailing to the Massachusetts hospital industry. Clarification of this point would eliminate confusion about whether a hospital holding a chronic/rehabilitation license would ever qualify for an inpatient hospice license.

In summary, the Board believes that there was substantial evidence presented that St. John of God's application was prejudiced by use of the Department's 1985 hospice guidelines. This constitutes a violation of 105 CMR 100.540(B). As such, it constitutes grounds for reversal. Accordingly, the Board orders DON application number 4-3313 remanded to the PHC for reconsideration according to the 1985 hospice guidelines.

All parties are by this decision notified of the right to judicial review of this decision under G. L. c. 30A, s. 14.

October 24, 1986

The Commonwealth of Massachusetts
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West Suburban Joint Diagnostic Services, Inc.
v. Department of Public Health

DoN Project No. 4-4692

FINAL DECISION

This Claim of Appeal to the Health Facilities Appeals Board ("Board") is made by West Suburban Joint Diagnostic Services, Inc. ("West Suburban"). West Suburban appeals the Department of Public Health's ("Department") June 10, 1986 denial of its application for a Determination of Need ("DoN"), to add a second magnetic resonance imaging ("MRI") unit at its free-standing facility in Wellesley, Massachusetts. West Suburban is a non-profit corporate consortium created to provide MRI services to populations in the west suburban areas of Greater Boston.* West Suburban's second application was deemed comparable to those filed by four other applicants: McLean Hospital ("McLean") (Project No. 4-3327A), the Faulkner and New England Baptist Hospitals ("Faulkner") (Project No. 4-3301), The New England Medical Center Hospital, Inc. ("NEMC") (Project No. 4-3347) and The Joint Center for MRI ("Joint Center"), comprised of the Dana Farber Cancer Institute and the Beth Israel, Brigham and Women's, Children's, and New England Deaconess Hospitals (Project No. 4-3354). The Joint Center was also applying for a second unit for its service area. Its first unit is located at the Beth Israel Hospital; the second is intended to be located approximately two blocks away at Brigham and Women's. According to the December 10, 1985, MRI guidelines, which governed consideration of these applications, only five more MRI units should be approved within HSA IV, where all five of the comparable applicants are located. (See Factor two, Measure 2, p. 8)

The five comparable applications were considered at the June 10, 1986 Public Health Council meeting. West Suburban's application was

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* The original consortium participants included Emerson, Framingham Union, Glover Memorial, Leonard Morse, Marlborough, St. Elizabeth's, Waltham-Weston and Newton-Wellesley Hospitals.

denied; the other four were conditionally granted. West Suburban's DoN notice specified as a reason for denial that "the application failed to meet the criteria of the Department's MRI guidelines (Factor two, Measure three) which require that an applicant proposing a second machine at the same location as an initial unit must demonstrate 3,000 scans on the first machine in order to establish need for a second unit." (emphasis as in original) West Suburban alleges that the Department abused its discretion by interpreting and applying the MRI guidelines in an unfair, arbitrary and capricious manner that contravened the intent of the guidelines. We agree.

The heart of this controversy involves the different meaning ascribed to the word demonstrate in Factor two, Measure three, when the guidelines were applied to West Suburban's request for a DoN as compared with the way they were applied to the Joint Center proposal. In order to analyze this controversy, it is important to understand that although the five applicants were deemed comparable within the meaning of 105 CMR 100.020, in reality there were at least two sub-categories of applicants: those seeking a DoN for clinical use for the first time (NEMC, McLean, Faulkner), and those requesting a second unit at the same location (West Suburban and the Joint Center). It is with this second sub-category of applicants, who are governed by Factor two, Measure three, that we are primarily concerned.

Within this sub-category of applicants for second units, it is important also to understand that each applicant was from a consortium of hospitals using their consolidated service areas to substantiate need for a second MRI unit. Thus it is not accurate to characterize the Joint Center's first application as one in effect from the Beth Israel while its second application was in effect from the Brigham. The consortium approach is designed to encourage cooperation and sharing, and the proposed physical location of the Joint Center's second unit several blocks away from the first is not determinative on the issue of whether the second unit is proposed for the "same location" within the meaning of the guidelines.

In denying West Suburban's DoN, the Department read the language of Measure three literally. Since West Suburban's first unit is not yet operational, the Department found that the applicant was unable to demonstrate 3,000 scans on the first machine in order to establish need for a second unit. (DoN notice, p. 11) The Joint Center could not make such a demonstration either, since its first unit is also not operational. Yet the Department granted its DoN on the basis of projected need, claiming that it was unnecessary to "demonstrate" need since the second unit will not be at the same location as the first...." (Joint Center DoN notice, p. 2) We find that the Department abused its discretion in treating these similarly situated applicants by different standards. West Suburban is entitled to consideration in an even-handed manner, and the Department cannot interpret its guidelines literally for the purpose of denying West Suburban and then expansively for the purpose of approving the Joint Center.

The Department cannot consolidate the Joint Center's hospital service areas for purposes of projecting need for a second unit, and

then claim that it is not bound to apply the language of Factor two, Measure three the same way to both of these applicants for second units because the Joint Center's second unit would be at a "different" location. The argument that a second unit two blocks away from the first is not "the same location" within the meaning of Measure three when the combined service areas of the Beth Israel and Brigham and Womens - and the other members of the consortium - were used to justify need for a second MRI smacks of disingenuousness at the very least.

The situation involved in this appeal is complicated by the fact that in the interim University Hospital has also been granted a DoN for an MRI unit, thus theoretically absorbing all MRI capacity permitted in HSA IV under the 1985 guidelines. To remand West Suburban's denial alone for reconsideration would be an empty gesture if no further MRI units can be approved in HSA IV. We have wrestled with the question of whether all four of the MRI applicants originally deemed comparable to West Suburban must be remanded for reconsideration in order to preserve the appellant's right to non-arbitrary treatment, or whether remand of the sub-category of applicants for a second unit - to which the Department's abuse of discretion was confined - would be sufficient.

Remand will necessitate further delay in making the benefits of MRI technology available to a large number of citizens in the Commonwealth. None of the comparable applicants for first unit approval seems to have contributed to the abuse of discretion in this case, but additional costs to them will inevitably be associated with the additional delay if they are all remanded together. In light of these considerations and those that follow, we conclude that the public interest will not be served by remanding all five comparable applications. We thus remand only West Suburban and the Joint Center, the two applicants who were treated dissimilarly by the Department even though both were applying for the same thing - a second MRI unit.

We recognize that in theory this reduces both West Suburban's and the Joint Center's chances for obtaining a DoN, but given the fact that University Hospital has been granted a DoN - which has not been appealed - in the interim, it would have been impossible to return all five applicants to the status quo anyway. We feel that in these unique circumstances the strong public interest in making MRI technology available to the citizens of the Commonwealth as soon as possible can be accommodated along with West Suburban's right to fair consideration by this resolution of the appeal.

Health Facilities Appeals Board
November 26, 1986

The Commonwealth of Massachusetts
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Rehab Associates of New England v.
Department of Public Health

DoN Project Nos. 3-4672 and 3-4681

FINAL DECISION

This appeal to the Health Facilities Appeals Board by Rehab Associates of New England ("RANE") is based on the Department of Public Health's ("Department") July 8, 1986 denial of its project number 3-4681, and approval of the comparable Determination of Need ("DoN") application of Merrimack Valley Health Services, Inc. ("MVHS"), project number 3-4672. The RANE application proposed development and operation of Magnetic Resonance Imaging ("MRI") clinical services in HSA III, with a maximum capital expenditure of $2,264,000 (as of September 1984). RANE is a limited partnership, formed to develop rehabilitation and diagnostic imaging within HSA III. It is an affiliate of New England Neurological Associates, a large medical practice group providing neurological, neurosurgical, and rehabilitation services.

The MVHS application is the proposal of a private, nonprofit corporation formed by a consortium of seven Merrimack Valley hospitals to provide regional MRI clinical services to residents of HSA III, with a revised maximum capital expenditure of $2,891,665 (as of September 1984). Both applications were for free standing MRI facilities with a location for RANE on the grounds of Bon Secours Hospital in Metheun, Massachusetts and a location for MVHS in the North Andover Business Park near the junction of two major highways which intersect with Route 495. Under the original MRI guidelines, the two applications had been declared comparable. Both applicants agreed to be reviewed under the revised MRI guidelines adopted by the Public Health Council on 10 December 1985, which provide MRI standards for the eight factors of review established by 105 CMR 100.533. These revised guidelines recommended that one MRI unit be allocated to serve HSA III.

The guidelines demonstrate preference for a multi-institutional, regional approach to MRI development in the Commonwealth. Factor 2, measure 6 of the 1985 guidelines states that preference will be given to, inter alia, applications "demonstrating multi-institutional arrangements for referrals as reflected in written agreements...." Factor 2, measure 3 of the guidelines provides that "[a]pplicants must submit signed referral agreements with other area instititutions which ensure equal access of all patients to be served by the MRI unit." With respect to the multi-institutional linkage issue, the department stated that:

> . . . the MRI guidelines have specifically encouraged the institutional -- not the individual . . . linkages of facilities, partly to facilitate patient care, but also as a way of disseminating a costly methodology in a cost-effective manner. (Public Health Council Transcript, p. 5, testimony of Susan Glazer).

The Department found that RANE's application failed to satisfy two of the eight DoN factors; Operational Objectives (Factor Three) and Relative Merit (Factor Seven). RANE DoN notice, August 7, 1986. The Department concluded that RANE had attempted to develop referral agreements from other hospitals, but had achieved no success except with respect to Bon Secours Hospital. Staff Summary p. 7.

With respect to Factor Seven, the Department determined that the RANE application was not superior to alternative methods (the MVHS application) for meeting the MRI requirements of HSA III. The Department also concluded, in accordance with the Guidelines, that on balance the RANE application was not superior to that of MVHS despite the lower cost. RANE contends that the Department abused its discretion by approving the MVHS application and denying RANE.

As we have stated in a prior appeal, the Public Health Council's "decision will frequently reflect a particular policy the Department wishes to advocate. This Board's function is not to second-guess or substitute its health policy views for the PHC's." The Department need only show a rational basis to support its policy choice. Annas Ten Taxpayer Group et al v. Department of Public Health et al, No. 4-3306 at 3, Health Facilities Appeals Board (September 24, 1985).

The Department has demonstrated a rational basis for seeking to promote regional development of expensive MRI technology through cooperative multi-institutional arrangements, and there is substantial evidence in the record to show that RANE was unable to demonstrate such institutional cooperation. MVHS, on the other hand, is a consortium of seven

hospitals cooperating to achieve the most efficient use of MRI technology. Although RANE's limited partners may have had staff privileges at several area hospitals, their individual agreements to refer patients to RANE are not equivalent to institutional commitments to support a regional resource. The Department was well within its discretion to decline to issue a determination of need to an applicant which could not - for whatever reason - demonstrate multi-institutional support for its project.

The core disagreement between RANE and the Department is the use of the MRI guidelines with respect to the issue of multi-institutional linkages. Although cost is an important issue, cost alone does not determine the most worthy applicant for DoN. After a careful review of the record, the Board finds that the Department did not abuse its discretion in applying the MRI Guidelines to deny RANE a DoN and to grant one to MVHS.

This appeal is therefore DENIED.

Health Facilities Appeals Board
December 19, 1986